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Morgan Services, Inc. and AFL-CIO Laundry and Dry Cleaning International Union, Local 168-39. Cases 3-CA-22305, 3-CA-22503-1, and 3-CA-22503-2

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE
AND WALSH

On December 15, 2000, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

We agree with the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act in January 2000 when it dealt directly with its rug department employees concerning a proposed change in the department's work schedule, and again that same month when it unilaterally changed the work schedule without affording the Union adequate notice and an opportunity to bar-

gain.⁴ There are no exceptions to the judge's finding that the Respondent did not unlawfully assist in circulating a petition signed by a majority of unit employees in April 2000, expressing their wish no longer to be represented by the Union, nor to the judge's further finding that because of the petition, the Respondent had a reasonable good-faith doubt of the Union's continuing majority status, and therefore did not act unlawfully when it refused to bargain for a new collective-bargaining agreement with the Union on and after May 2, 2000.

The judge ordered the Respondent to cease and desist from dealing directly with its unit employees concerning work schedules, and from unilaterally changing work schedules "without affording the Union the opportunity to bargain over the change." The judge further ordered the Respondent to take the affirmative actions, at the Union's request, of rescinding its unilateral change in the rug department's work schedule and of bargaining over that change. In footnote 15 of his decision, however, the judge acknowledged that because the "Respondent is evidently free to continue to refuse to bargain," the "practical application [of the proposed remedy] in the circumstances of this case is questionable."

Contending that it has withdrawn recognition from the Union, the Respondent excepts, inter alia, to being compelled to bargain with the Union. Opposing this exception in its answering brief, the General Counsel states that although the Respondent withdrew from negotiations on May 2, 2000, it has never withdrawn recognition. In its reply brief, the Respondent asserts that it has now expressly withdrawn recognition. In its opposition to the Respondent's posthearing motion, *supra* fn. 1, the General Counsel contends that the issue of whether events have occurred since the hearing that would make compliance with an order to bargain unwarranted should be resolved through a compliance proceeding. We agree with the General Counsel, and accordingly find that the parties' dispute concerning an issue of fact material to the remedy in this case is best left for resolution at compliance. Meanwhile, we will modify the recommended Order in a way that leaves this disputed issue open by providing that the Respondent must cease and desist

¹ After briefing, the Respondent also filed a "Motion to Take Official Notice of the Board's Records and Uncontested Matter," in which it asked us to take administrative notice of the contents of a Region 3 investigative file concerning a withdrawn unfair labor practice charge, and of a letter dated July 23, 2001, assertedly sent by the Respondent to the Union, which announces that the Respondent is withdrawing recognition from the Union retroactive to May 2, 2000. The General Counsel has filed an opposition to this motion. Because our decision makes it unnecessary for us to consider the documents that the Respondent thus seeks to add to the record, we find it unnecessary to pass on the Respondent's motion.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We have modified the recommended Order to include the Board's narrow cease-and-desist provision, which the judge inadvertently omitted. We have also made corresponding changes to the notice.

⁴ In adopting these violations of Sec. 8(a)(5) and (1), we note that the judge based his finding of an unlawful unilateral change on the Respondent's statutory bargaining duty, as well as on what the judge variously termed the Respondent's "contractual/past practice," "contractual and/or past practice," and "contractual" obligation. In affirming the judge's finding of a unilateral change violation, we do not rely on the judge's language insofar as it purports to impose contractual duties on the Respondent. That language conflicts with the judge's unexcepted-to finding that the most recent collective-bargaining agreement between the Respondent and the Union had expired by the time of the events at issue in this case.

from bypassing and refusing to bargain with any labor organization that is or may become its employees' representative, and must take certain affirmative actions at the Union's request if the Union still represents the Respondent's bargaining-unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Morgan Services, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing any labor organization that is or may become the exclusive representative of its employees and dealing directly with represented employees concerning their days and/or hours of work.

(b) Changing the days and/or hours of work of its employees without first affording any labor organization that is or may become the employees' exclusive representative a meaningful opportunity to bargain over the proposed change.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, upon request of the Union if the Union is still the exclusive bargaining representative of the unit employees, rescind its unilateral change in the hours of work and/or schedule of work of unit employees in its rug department.

(b) Within 14 days of this Order, upon request of the Union if the Union is still the exclusive bargaining representative of the unit employees, bargain over the change in the hours of work and/or schedule of work of unit employees in its rug department.

(c) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen,	Chairman
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John C. Truesdale,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to stop and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT bypass any labor organization that is or may become the exclusive bargaining representative of our unit employees and deal directly with our unit employees concerning their days and/or hours of work.

WE WILL NOT change the days and/or hours of work of our unit employees without first affording any labor organization that is or may become the exclusive bargain-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ing representative of our unit employees a meaningful opportunity to bargain over the proposed change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if the AFL-CIO Laundry and Dry Cleaning International Union, Local 168-39 is still the exclusive bargaining representative of our unit employees, rescind at the Union's request the unilateral change in the hours of work and/or schedule of work of our unit employees in the rug department.

WE WILL, if the AFL-CIO Laundry and Dry Cleaning International Union, Local 168-39 is still the exclusive bargaining representative of our unit employees, bargain at the Union's request over the change in the hours of work and/or schedule of work of our unit employees in the rug department.

MORGAN SERVICES, INC.

Ronald Scott, Esq., of Buffalo, New York, for the General Counsel.

Thomas Canafax Jr., Esq., of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Buffalo, New York, on August 3 and 4, 2000. AFL-CIO Laundry and Dry Cleaning International Union Local 168-39 (Union) filed the original charge in Case 3-CA-22305 on January 13, 2000¹ and an amended charge on March 21. The filed the original charge in Case 3-CA-22503-1 on May 3 and filed an amended charge on July 17. The Union filed the charge in Case 3-CA-22503-2 on May 3. On July 19, the Regional Director for Region 3 issued an order consolidating cases, amended consolidated complaint and notice of hearing (complaint). The complaint alleges that Morgan Services, Inc. (Respondent or Morgan) engaged in certain conduct in violation of the National Labor Relations Act (Act). Respondent filed timely answer denying it violated the Act. It did admit certain complaint allegations including the jurisdictional allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the operation of a commercial laundry service at its facility in Buffalo, New York.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Respondent engages in the processing and rental of linens and uniforms for business, industry, restaurants and health care facilities in the Buffalo, Jamestown, Olean, and Rochester, New York areas. The Union has represented a unit of Respondent's employees since about 1970.² As of May 1, there were 72 employees in the unit. The last collective-bargaining agreement between the Union and Respondent was effective by its terms from December 19, 1994 to October 1, 1997. After the expiration of the last collective-bargaining agreement in 1997, the parties engaged in negotiations for a successor agreement for 3 years. The last negotiating session was held in April. Following the expiration of the 1997 agreement, Respondent continued to adhere to the provisions of the expired agreement except with regard to grievance and arbitration, and dues checkoff. According to Respondent's area general manager Samuel T. Grieco Jr., the two primary issues that had separated the parties during negotiations was Respondent's desire to have the employees convert from the Union's pension plan to Morgan's pension plan, and the Union's desire to have a union shop rather than continue the maintenance membership clause in the expired contract.

The parties were engaged in negotiations for a successor agreement in the spring of 2000. On May 1, Morgan employee and unit member Susan Dunn filed a decertification petition with the Board. Shortly thereafter, Respondent, citing a good faith reasonable doubt of the Union's majority status, broke off negotiations until that matter was resolved. Region 3 dismissed the decertification petition on July 7 because of the allegations contained in the charges filed in this proceeding.

The complaint alleges that Respondent violated the Act by:

1. On or about April 19, by Production Supervisor Debbie Plaza, at Respondent's facility, soliciting employees to circulate a petition to decertify the Union, and soliciting other employees to sign the decertification petition.
2. On or about January 14, by Production Supervisors Hector Chucardo and Clint Ellis, at Respondent's facility, bypassing the Union and dealing directly with its employees in the unit, in regard to their hours of work.
3. (a) On or about January 17, changing the hours of work of its employees in the unit.
(b) The subject set forth immediately above relates to wages, hours, and other terms and conditions of employ-

¹ All dates are in 2000 unless otherwise indicated.

² The following employees of Respondent, herein called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act: All full-time and part-time production and maintenance employees, including lead workers, but excluding engineers, office and clerical employees, salespersons, route drivers (service representatives), guards, professional employees and supervisors as defined in the National Labor Relations Act.

ment of the unit and is a mandatory subject for the purposes of collective bargaining.

(c) Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

4. On or about May 1, canceling a negotiating meeting with the Union and since that date has refused to meet with the Union for the purposes of negotiating a collective-bargaining agreement.

By its conduct alleged above, Respondent is alleged to have violated Section 8(a)(1) and (5) of the Act.

B. The Complaint Allegations Regarding Unilateral Changes and Direct Dealing.

1. The Facts Regarding Direct Dealing and Unilateral Changes

Respondent used two employees, William Toomey and Iman James, to clean rugs. They did so in the night time hours Sunday through Thursday. On Sundays, they were the only employees in the plant, with no supervision and no maintenance support. In December 1999 or January, Respondent's supervisor Clint Ellis suggested to Area General Manager Grieco that it would be more practical to have Toomey and Iman work Monday through Friday. On those days, there would be supervision and maintenance support. Grieco told Ellis to talk with the two affected employees to see if the change was acceptable to them.

On January 14, Grieco faxed a letter to Edward Skibinski, union president. The letter states:

This is to advise you that on Monday, January 24, 2000, we will be changing the day of the week that the rug department will work. They will change from Sunday through Thursday, 10:00 pm—6:30 am to Monday through Friday, 10:00 pm—6:30 am. We have discussed this with Bill Toomey and Iman James and they are agreeable to this change. If you have any questions or need any further information, please contact me at any time.³

Skibinski testified that he had heard nothing from the Respondent about this matter before receiving Respondent's January 14 fax. He had heard rumors from employees beginning in December 1999 about a change in the rug department. Acting on these rumors Skibinski tried unsuccessfully to reach Grieco in early January. He testified that he then spoke with Production Supervisor Hector Chucardo, who told Skibinski that Grieco had had a meeting with the two rug department employees and they had said the change was okay. Chucardo denied that this conversation ever occurred.⁴

³ At the opening of the hearing, the parties stipulated as follows: Beginning with the payroll week ending January 22, the schedules of bargaining unit employees William Toomey and Iman James were changed from a Sunday through Thursday schedule to a Monday through Friday schedule. The start times of these two employees were changed from 10 p.m. to 9 p.m.

⁴ Whether the conversation occurred or not is immaterial to a decision in this matter. I do however, credit Skibinski's testimony over Chucardo's denial. Skibinski filed a charge in this case on January 13,

By letter dated, January 18, Skibinski replied to Grieco, stating:

I am in receipt of your letter dated January 14, 2000 in regards to changing the starting time for the rug department. The Union would like to negotiate this issue with you. Please contact me to set up a negotiation date for same.

Grieco testified that on January 19, responding to Skibinski's letter, he called and left a message on Skibinski's voice mail asking Skibinski to call him. The change in Toomey's and Iman's schedule had gone into effect on January 17. According to Grieco, this was the result of a miscommunication between him and his supervisors. He had instructed the supervisors that the Union had to have 5 days notice of the proposed change in schedule.⁵ According to Grieco, the change occurred early because January 16 was the date of the Super Bowl and the affected employees wanted to make the change early to be able to see the game. Grieco testified he learned of the early start for the change after getting a charge Skibinski filed with the Board. Skibinski filed the charge on January 13, a day before he received formal notice that the change was going to occur.

Skibinski testified that he spoke to Grieco about the matter of the schedule change at the next bargaining session held January 27. He had filed a charge with the Board over the change and asked Grieco why he was making the change without first negotiating the issue. According to Skibinski, Grieco told him the same thing as Chucardo, that he had asked the affected employees and they had no problem with the change. Grieco denied the entire substance of Skibinski's testimony in this regard. He denied that the Union ever objected to the change in schedule to him, except for the filing of the charge. He denied that anyone connected with the Union ever spoke to him about the matter. I do not credit Grieco in this regard. The Union filed a charge, requested bargaining and no bargaining took place. I find it highly unlikely that Skibinski would let the matter drop under these circumstances. Thus I credit Skibinski's testimony in this regard.

2. Conclusions Regarding Direct Dealing

Grieco admitted that Supervisor Ellis asked Toomey and Iman for their input into the proposed schedule change. He noted that the change took effect earlier than planned at the request of the affected employees. General Counsel asserts that

prior to receiving notice from Respondent that a change was taking place and that the two affected employees had been approached about the change. It is logical to assume that the information about these matters came to Skibinski in this conversation with Chucardo.

⁵ The expired contract which Respondent was adhering to had a provision for changing starting and quitting times for employees. Article III, Section 8.4 states that if the employer desires to change starting and quitting times, it must give five days notice to the Union. If the Union objects, it may request to negotiate over the proposed change within 72 hours of the notice of the proposed change. The parties then must negotiate prior to the expiration of the five-day notice period. Grieco testified that under certain circumstances, schedules had historically been changed without notice. These circumstances involved weeks with holidays and weeks when the workload is above normal. The Union has never objected to these temporary changes in the work schedule.

by bypassing the Union and speaking first with the employees, Respondent has violated Section 8(a)(1) of the Act. In support of this position, he cites the case of *Harris-Teeter Supermarkets*, 310 NLRB 216, 217 (1993). That case is almost directly in point. In *Harris-Teeter Supermarkets*, the employer and union were in long running negotiations for a first collective-bargaining agreement. Though no total agreement had been reached, the parties had signed a letter of understanding allowing the employer to change a person's hours or shift for up to 30 days without negotiating with the union. In the year involved in that case, Christmas fell on a Sunday, a regular workday for the affected employees. As a result the employer decided these employees would work on Saturday, their normal day off. After the change was made, the employer decided it was more efficient for the employees to follow the changed schedule on an on-going basis. It met with the affected employees and asked their opinion on the issue. They objected, but the employer implemented the change anyway. The change in schedule was to be a matter for negotiations and was temporary until negotiations could take place.

With regard to the solicitation of input by employees, the Board held:

By soliciting the sentiment of employees on a subject to be discussed at the bargaining table, Respondent was usurping the Union's function and attempting to arm itself for upcoming negotiations As set forth in *Obie Pacific, Inc.*, 196 NLRB 458 (1972), the issue is whether the Respondent 'may attempt to erode a union's bargaining position by engaging in a direct effort to determine employee sentiment' rather than discuss such matters solely with the union. The Respondent 'may not seek to determine for himself the degree of support, or lack thereof,' which exists for a position that it seeks to advance in negotiations with the employee bargaining representative. (citations omitted) by seeking to ascertain employee sentiment on the changed work schedule in advance of presenting the proposed change to the Union, the Respondent engaged in direct dealing in violation of Section 8(a)(5) of the Act.

I can find no material difference between the situation in *Harris-Teeter Supermarkets* and the one in the instant case. As will be discussed below, Respondent had a statutory and contractual obligation to negotiate over the schedule change. Rather than notify the Union of the proposal and let it determine the sentiment of the affected employees, Respondent, like the employer in *Harris-Teeter Supermarkets*, went first to the employees. For the reasons articulated in *Harris-Teeter Supermarkets*, I find and conclude Respondent has engaged in direct dealing in violation of Section 8(a)(5) of the Act.

3. Conclusions with respect to the Unilateral Changes

Respondent had a statutory and a contractual/past practice obligation to bargain over the schedule change before implementing it. An employer who effects unilateral changes in terms and conditions that are mandatory subjects of bargaining commits a *per se* violation of Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 738 (1962). The Board has consistently found that schedules and hours are mandatory bargaining sub-

jects. *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992), citing *Water's Edge*, 293 NLRB 465 (1989). It is beyond serious debate that the starting times and the workdays of the rug department employees are mandatory subjects of bargaining. While Respondent may assert that the change was *de minimus*, and does not rise to the level of a violation, the Board has found unilateral changes in employees' starting times to be material and substantial changes which violate Section 8(a)(5). *Blue Circle Cement Co., Inc.*, 319 NLRB 954 (1995).

Moreover, Respondent had a contractual and/or past practice obligation to give the Union five days notice of the proposed change and, upon request within 72 hours, bargain over the proposed change. The proposal was implemented, however within three days of the notice to the Union; in effect, making it a fait accompli. Respondent argues that the Union has waived its right to negotiate over the matter by failing to return Grieco's voice mail message or otherwise following up on its January 18 written request to so bargain. I disagree. There is no dispute that Respondent gave notice of the proposal in writing on January 14 and the Union, in writing, within 72 hours, requested bargaining over the proposal. As the duty to bargain upon request is both statutory and, in this case, contractual, Respondent had an obligation to actually ensure that its response was received by the Union. It did not do so. There is no way to be sure that Grieco's voice mail message was ever received by the Union. Respondent could have replied by fax, the method by which its notice was sent and proof would have existed that it did respond. Absent such proof, I find that Respondent has failed in its statutory duty to bargain over the schedule change and its unilateral implementation violates Section 8(a)(5) of the Act. The Union clearly did not waive its right to bargain. It made the request in writing and filed a charge. Respondent, not the Union, had the duty to follow up and bargain. It did not do so.

C. The Issue of Reasonable Doubt of Majority Status and Refusal to Negotiate.

1. Facts and Credibility Resolutions

The last bargaining session was held in April. There was a session scheduled for May 1. Prior to that meeting, Skibinski got a voice mail message from Respondent's negotiating representative. The message said that because Grieco had gotten a petition from employees stating that they no longer wished to be represented by the Union, Grieco did not feel it was right to continue negotiations. The bargaining representative then gave notice that negotiations were terminated.

Skibinski attempted two or three times to reach this representative, but was unsuccessful. Skibinski shortly thereafter received a letter dated May 2 from Grieco. It states:

As you are aware, a petition has been filed with the NLRB by some of our employees seeking an election to determine the Union's status as bargaining representative. In addition, we have received strong evidence that a majority of the employees in the bargaining unit do not wish to be represented by the Union. Because of this evidence, and because the Company is led to have a good faith reasonable doubt of the Union's majority, it is best to defer

any further negotiations until the Union has established its majority in a supervised NLRB election.

Grieco testified that on May 1, unit employee Susan Dunn came to him and showed him a petition signed by employees.⁶ It stated they did not want the Union. She told him she was taking the petition to the NLRB. She gave him a copy and asked him to stop negotiations. She further stated that based on her knowledge gained from previous decertification efforts she had engaged in, she believed the Respondent did not have to continue negotiations because of the petition. Dunn had worked for Morgan for 20 years and had filed four previous petitions that resulted in elections won by the Union. As of May 1, Grieco was familiar with all of the employees whose names appeared on Dunn's petition. They were all employees, except Jose Rivera, who was terminated on May 1 for failing to come to work.⁷

Grieco went to his payroll clerk and determined that on May 1, there were 72 bargaining unit employees. There were 42 names on Dunn's petition. Grieco then called his labor counsel and asked if he could cease negotiations and was told he could. He instructed counsel to inform the Union that negotiations were terminated. He testified that he based the "good faith reasonable doubt of the Union's majority" as stated in his May 2 letter on the Dunn petition and on statements made to him and his supervisors by employees expressing their displeasure with the Union and the proposed contract.

As noted above, on May 1, a decertification petition was filed with Region 3 by Susan Dunn. The petition alleges that there are about seventy employees in the unit. The petition was supported by a petition signed by 42 of Respondent's employees stating that they do not wish to be represented by the Union. On July 7, the Region dismissed the decertification petition.

Following the dismissal, Skibinski sent a letter dated July 25, to Grieco, stating:

Please be advised that the Union would like to schedule our next negotiating session with Morgan Services. Your cooperation is appreciated in responding to us within the next twenty four to forty-eight hours. If you are taking the position that you do not wish to come to the bargaining table, additional charges will be filed.

Grieco sent on July 28, a reply to Skibinski's July 25 request. Grieco wrote:

After giving a lot of thought to your letter requesting the resumption of bargaining, I believe it would be injurious to the Company—and probably to the Union—to do so until the question as to the Union's majority status has been cleared up. The petition disavowing the Union was signed by a large majority and its timing just as the parties were about to finalize a contract suggests that to ignore the

petition would create loss of a significant part of its work force. I urge the Union to reconsider its opposition to holding an election at this time.⁸

The Region's dismissal of the petition is based on the complaint allegation that Production Supervisor Debbie Plaza solicited employees to sign the petition disavowing the Union. This petition was started by Susan Dunn who has worked for Morgan for 20 years and does not want to be represented by the Union. As noted earlier, she has filed several decertification petitions over the years of her employment. She prepared the latest petition and solicited employees to sign it. This petition will be referred to as Dunn's petition.

The allegation of unlawful solicitation came from former Morgan employee Rosechianti (Rose) Applewhite. Applewhite worked for Respondent in a unit position for a year or two, leaving in May to take a job working with retarded people. Applewhite's uncle is a long-time employee of Morgan and was a union steward at the time of the events discussed below. Applewhite was sure that Plaza was aware of the relationship between Applewhite and her uncle, and also knew he was a union steward. Plaza verified in her testimony that she was so aware.

Applewhite's immediate supervisor was Plaza. Applewhite testified that at some point toward the end of April, while working, Plaza approached her and asked her to pass around Dunn's petition. According to Applewhite, Plaza asked, "Would one of you ladies like to take a break to take this around?"⁹ Applewhite testified that there was another female employee working with her at the time. She believed the other employee was Hope Ersing. According to Applewhite, Ersing said, "I'll finish doing this [her work]. Rose, you go ahead and pass it around." Ersing testified and denied Applewhite's assertions. Ersing testified that she went to Dunn's workstation and signed the petition without any input from Applewhite or Plaza. Plaza denied all of Applewhite's assertions in this regard. She noted that she had been told prior to the circulation of the latest petition to get rid of the Union that she could not discuss the petition, could not promise anything other than to tell employees they would not be hurt by decertification.

Morgan employee and unit member Sarah Washington saw Applewhite soliciting an employee for her signature on Dunn's petition. She heard Applewhite ask the employee to sign the petition to get rid of the Union. According to Washington, the employee asked if Applewhite was crazy and why she was circulating the petition. Applewhite said, "Well, maybe Debbie asked me."¹⁰ Applewhite did not ask Washington to sign, noting to Washington, "Well, Sarah, I know you are not going to sign." Washington's husband is also a Morgan employee and a union steward.

⁶ Grieco testified that Morgan did not restrict solicitation of any kind in the work place so long as it is not disruptive. It allows employees to solicit money for raffles and to sell Avon and other products.

⁷ Susan Dunn, William Toomey and Rosechianti Applewhite between them testified they obtained almost every name on the list and/or witnessed the employees sign the list. All of the signatures were obtained between April 20 and May 1.

⁸ Grieco testified that based on comments made to his supervisors and passed on to him, Morgan would lose a significant number of employees who would quit if negotiations resumed.

⁹ On redirect testimony, Counsel for General Counsel pointed out that in her deposition given the Board, Applewhite said that Plaza had also said the petition "was to take out the Union."

¹⁰ As I understand the transcript, Washington identified this employee as Corenda Prior, the thirtieth person to sign the Dunn petition.

Applewhite testified that at the time Plaza allegedly asked her to circulate Dunn's petition, there were 17 signatures on the petition. Applewhite testified that she did as Plaza requested and obtained 11 more signatures on the petition. According to Applewhite, she did not tell any of the employees she solicited to sign the petition that Plaza had requested her to do so. She testified that she approached employees on the day in question and asked if they wanted to vote the Union out, and if they did, gave them the petition to sign. Applewhite testified that when she had finished soliciting signatures, she took the petition to Dunn.

Dunn testified that Applewhite came to her and asked for the petition. Present when this request was made was employee Donna Chapman. According to Dunn, Applewhite wanted to sign the petition because she did not want to pay union dues. Dunn testified that she asked Applewhite to take the petition to Applewhite's department and see how many signatures she could get. According to Dunn, Applewhite said, "No problem." She also testified that Applewhite and Hope Ersing signed the petition at Dunn's workstation. According to Dunn, Applewhite took the petition and came back a few minutes later with several new signatures on it. Dunn commented to Applewhite, "Rose, I can't believe you took the petition around." Applewhite asked, "Why?" Dunn replied, "Because your uncle is Tommy Applewhite." Applewhite responded, "I ain't afraid of my uncle. I'll go downstairs and ask him to sign the petition."¹¹

About a week before Applewhite left Morgan's employ, her uncle asked her why she circulated the petition, noting that it would hurt him.¹² She told him it was because Plaza told her to do it.

About 2 days before the alleged request to solicit signatures by Plaza, Applewhite and Plaza had had a conversation following a company meeting where the employees were told that they would get a quarter raise resulting from negotiations with the Union. According to Applewhite, in this conversation, Plaza said that "[W]ithout the Union, we can give you at least two dollars more than a quarter." According to Applewhite another female employee was present for this conversation. She did not know the employee's name, but believed she was a relative of either Sue Dunn or Debbie Plaza and worked at the same table as Dunn.¹³ This employee was evidently Donna Chapman.

¹¹ Employee Chapman corroborated Dunn's testimony in these regards.

¹² The uncle, Thomas Applewhite, was one of two employees who would have been hurt by the proposed new contract that would have required converting to another pension plan. He was near retirement age.

¹³ At the same employee meeting, employees were told that the Respondent and Union were close to reaching a new contract. If the proposed contract were signed they would have to pay Union dues. According to Applewhite, this did not appeal to her friends at work. According to Grieco, about twenty unit employees had not paid union dues under the maintenance membership clause. Some of these employees expressed their displeasure about paying dues to Grieco, even threatening to quit Morgan if the contract was signed with the union shop provision in it. Susan Dunn testified that a number of employees, including Ms. Applewhite had complained to her that they did not want to pay Union dues. Employee William Toomey also testified that a number of employees, including himself, did not want to pay union

Dunn testified that about 2 days before Applewhite signed the petition, they had a conversation about the Union. It was after the employee meeting. According to Dunn she told Applewhite that she would be coming around with a petition for a vote to get rid of the Union. She told Applewhite that would be the way to avoid paying union dues. She also told Applewhite that the employees would probably get a dollar an hour wage increase because that was what happened when the service representatives voted to decertify. Dunn based her belief in this regard on what the service representatives had told her.

Employee Donna Chapman testified that she had a conversation with Applewhite after the employee meeting. Supervisor Plaza was also present. Chapman testified that Applewhite expressed her fear that people would lose their jobs without a union. Chapman expressed her belief that that fear was ridiculous. Plaza commented that "you will not be hurt." Chapman denied that Plaza said anything about a raise and what would happen with regard to benefits or wages if the Union were voted out. Plaza testified that Applewhite raised concerns about job security if the Union was decertified and Plaza remarked, "All I can tell you, is that you won't be hurt." She denied saying anything about a raise or how much money employees would get if the Union were decertified.

Clearly if Applewhite is believed, Respondent violated the Act by involving itself in the decertification effort. However, I do not believe Applewhite's testimony with regard to Plaza's role in the decertification effort nor do I credit her testimony that Plaza told her the Respondent would give \$2 raise if the Union were decertified. Instead, I credit the consistent testimony of Plaza, Dunn, Chapman, and Ersing. I find that for whatever reason, Applewhite, without any encouragement from Respondent, decided to sign Dunn's petition. I further credit Dunn's testimony that it was she who asked Applewhite to circulate the petition and it was this request that caused Applewhite to do so. A plausible reason for Applewhite's implication of Plaza in her circulating of Dunn's petition is that having taken the action, she wanted to divert the wrath of her Union Steward uncle and other relatives who work at Morgan. In any event, I do not believe and do not credit her testimony to any extent that it is different from the testimony of Respondent's witnesses.

2. Conclusions on the Issue of Good-Faith Doubt of Majority Status

I find that Respondent, by Grieco, had a bona fide reasonable good faith doubt of the Union's majority status, based on objective considerations, on and after May 1. I have found Dunn's petition to be untainted. There was no unlawful inducement made to employees to sign the petition. The signatures have been verified by payroll records and by the oral testimony of Dunn, Applewhite, Chapman, Ersing, and Toomey. The petition contains the names of almost 60 percent of the unit employees employed on May 1. The testimony of Dunn and Toomey certainly support Grieco's testimony that he also received input from a number of employees who did not want to

dues. Both Dunn and Toomey testified that they and other named employees expressed these sentiments to Grieco and other supervisors.

pay union dues and who might resign if they were required to do so. I credit Grieco's testimony in this regard.

Having found that Respondent has a good-faith reasonable doubt of the Union's majority status among unit employees, I find that it was not a violation of the Act to terminate negotiations with the Union. As recently as May 22, the Board has reaffirmed its reasonable doubt rule. In *Bridgestone/Firestone, Inc.*, 331 NLRB No. 24, slip op. 5 (2000), the Board held:

Based on its good faith doubt, we find, as in *Burger Pits, Inc.*, *supra*, (273 NLRB 1001 (1984) that the Respondent was privileged to inform the Union on April 29 that it would not bargain for a successor agreement. As the Board stated in *Burger Pits, id.* at 1001: 'It is also established that within a reasonable time prior to the expiration date of a collective-bargaining agreement, an employer who establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement. See also *Auciello Iron Works, supra*, at 368.¹⁴

CONCLUSIONS OF LAW

1. Morgan Services, Inc., is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the exclusive bargaining representative of Respondents employees in the following described unit:

All full-time and part-time production and maintenance employees, including lead workers, but excluding engineers, office and clerical employees, salespersons, route drivers (service representatives), guards, professional employees and supervisors as defined in the National Labor Relations Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by:

a. On or about January 14, 2000, bypassing the Union and dealing directly with its employees in the unit, in regard to their hours of work.

b. On or about January 17, 2000, unilaterally changing the hours of work and/or days of work of its employees in the unit, without affording the Union the opportunity to bargain over the change.

5. The Respondent did not commit the other unfair labor practices alleged in the complaint.

6. The unfair labor practices found to have been committed are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

¹⁴ As stated in *Auciello Iron Works*, 317 NLRB 364, 368 (1995), "the existence of a good-faith doubt is a question of fact. The employer has the burden of proving that it had a reasonable, good-faith belief that the union no longer represented a majority of the bargaining unit employees." Further, that good-faith doubt must be based on objective considerations. *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). We find that the Respondent has met this burden, and no party contends otherwise.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully changed the hours of work and/or the work schedules of its unit employees without giving the Union the opportunity to bargain over the changes, should be ordered to upon request of the Union, rescind the unilaterally implemented changes and restore the *status quo ante*. It should also be ordered, upon request of the Union to bargain over the changes.¹⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Morgan Services, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealing directly with its employees in the unit, in regard to their hours of work.

(b) Unilaterally changing the hours of work and/or days of work of its employees in the unit, without affording the Union the opportunity to bargain over the change.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of this Order, upon request of the Union, rescind its unilateral change in the hours of work and/or schedule of work of its unit employees in its rug department.

(b) Within 14 days of this order, upon request of the Union, bargain over the change in the hours of work and/or schedule of work of its unit employees in its rug department.

(c) Within 14 days after service by the Region, post at its facility in Buffalo, New York copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

¹⁵ Although this is the Board's traditional remedy for a violation of the type I have found to have been committed, its practical application in the circumstances of this case is questionable. Presumably, the decertification petition will be refiled and until an election determines the Union's continuing status as bargaining representative, Respondent is evidently free to continue to refuse to bargain. Perhaps the matter can be resolved at the compliance stage, or by the Board on appeal.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 15, 2000

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bypass the Union and deal directly with our employees in the unit in regard to their hours of work.

WE WILL NOT unilaterally change the hours of work and/or days of work of our employees in the unit, without affording the Union the opportunity to bargain over the change.

WE WILL, within 14 days of the Board's Order, on request of the Union, rescind our unilateral change in the hours of work and/or schedule of work of our employees in the unit in our rug department.

WE WILL, within 14 days of the Board's Order, on request of the Union, bargain over the change in the hours of work and/or schedule of work of our employees in the unit in our rug department.

MORGAN SERVICES, INC.